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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

DON RICHARDS, Petitioner,	D.C. CV. No. 2001/0212 28 U.S.C. § 2255
v.	Ref.: D.C. CR. NO. 1998/0227
UNITED STATES OF AMERICA, Respondent.	

Copies to:
Curtis V. Gómez, District Judge
Geoffrey W. Barnard, Magistrate Judge
Don Richards #00694-094, E-2, FCC Yazoo City (Medium), P.O. Box 5888, Yazoo City, MS 39194-5888 (Please Mark: "LEGAL MAIL: OPEN IN PRESENCE OF INMATE ONLY")
St. Clair Theodore, AUSA
Carl F. Morey, AUSA
Law Clerk-TLB
O. Schneider
C. Francis

MEMORANDUM OPINION AND ORDER

Pro se Petitioner, Don Richards ("Richards" or "Petitioner"), is before the Court on a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence and the Government's opposition thereto.[1] On October 16, 2002, the Honorable Thomas K. Moore held an evidentiary hearing in this matter.[2] Then, on December 20, 2002, Magistrate Judge Geoffrey W. Barnard granted the Government's

[1] Also before the Court are Petitioner's supplemental filings, the Government's responses, and Petitioner's replies.

[2] *See* Rules Governing Section 2255 Proceedings, Rule 8 (providing that "[i]f the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted . . . to determine whether an evidentiary hearing is warranted").

Motion to Stay the instant § 2255 motion while the Court of Appeals for the Third Circuit decided his appeal (No. 02-3909). That stay was subsequently lifted on December 2, 2004. For the reasons stated below, Petitioner's § 2255 motion will be denied.

FACTS AND PROCEDURAL HISTORY[3]

Richards and his co-defendant, Theodore Greenaway, were tried jointly and convicted of crimes committed during the robbery of a Brink's armored van. Richards was convicted of conspiracy in violation of 18 U.S.C. § 371, interference with commerce and aiding and abetting in violation of 18 U.S.C. §§ 1951 and 2, possession of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1), and first degree robbery and aiding and abetting in violation of 14 V.I.C. §§ 1862(2) and (11). Petitioner was sentenced to 121 months on the Hobbs Act charge and 60 consecutive months on the firearm charge. The sentence imposed on the territorial charges was to run concurrent with the federal sentence. Petitioner appealed.

On his first appeal to the Court of Appeals for the Third Circuit ("Court of Appeals"), Richards argued: 1) that his Sixth Amendment right was violated by the admission of an out-of-court

[3] Because this opinion is written only for the parties, this discussion is restricted to the facts and legal principles necessary to resolve this motion under 28 U.S.C. § 2255.

statement given by a non-testifying co-defendant; 2) that the Jencks Act was violated by the Government's failure to produce the FBI agent's written report concerning the co-defendant's oral statements; and 3) that there was juror misconduct. The Court of Appeals found that the admission of Richards' co-defendant's statement violated his Sixth Amendment right to confront witnesses under *Bruton v. United States*, 391 U.S. 123 (1968), and further found that the government's failure to produce the FBI agent's written report of the co-defendant's oral statement violated the Jencks Act. Despite these two errors, the Court of Appeals found that the errors were not reversible because there was "overwhelming evidence of Richards' guilt" independent of his co-defendant's out-of-court statement; there was "no manifest injustice;" and "the fairness of the trial was not seriously affected." *United States v. Richards*, 241 F.3d 335, 337 (3d Cir.), *cert. denied*, 533 U.S. 960 (2001). Lastly, the Court of Appeals found that this Court did not abuse its discretion in denying two motions for mistrial based on juror misconduct. Accordingly, on February 26, 2001, the Court of Appeals affirmed Richards' conviction and sentence.

Then, on May 2, 2001, Richards filed a Motion to Modify Term of Imprisonment pursuant to 18 U.S.C. § 3582(C)(2). Upon review,

Judge Moore modified Richards' sentence on October 16, 2002.[4] Richards then appealed Judge Moore's refusal to reduce the amount of restitution. He argued before the Court of Appeals that this Court:

> 1) erred by failing to hold an evidentiary hearing to calculate an accurate amount for restitution; and
>
> 2) failed to consider his financial position in imposing restitution and requiring that he adhere to a schedule of payments as a special condition of release.

The Court of Appeals noted that Richards had been "entitled to a modification of his sentence due to a limited change in the Guidelines that only impacted the calculation of his offense level." *United States v. Richards*, 68 Fed. Appx. 340, 341 (3d Cir. 2003). That court concluded, however, that the "amendment had no effect on the amount of Richards' restitution, or the manner in which it should have been calculated," and declined to consider his appeal of the restitution order. *Id*. The appeal was dismissed for lack of jurisdiction.

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[4] Richards' sentence was modified to a term of 60 months on each count: I, II, and III. He was committed to the custody of the U.S. Bureau of Prisons as follows:

> Counts I, II, and IV shall be served concurrently with each other and consecutive to Count III. The Judgment further provided that Richards shall be on supervised release for a term of three (3) years on Counts I, II and III and the terms are to run concurrent with each other. Richards was also required to pay a Special Assessment of $100.00 for Counts I, II, and III and Restitution of $98,813.85 on Count I.

Richards was committed to the Virgin Islands Bureau of Corrections for imprisonment for a period of 5 years to be served concurrently with the sentences imposed on Counts I and II, violations of the U.S. Code. Richards was given credit for time served since October 12, 1998.

While Richards' Motion to Modify Term of Imprisonment was pending in this Court, he filed, on November 5, 2001, the instant motion under § 2255 alleging that:

> 1) There was insufficient evidence at trial to support a finding that the robbery affected interstate commerce.
>
> 2) There was prosecutorial misconduct when the government disclosed exculpatory statements made by co-defendant Greenaway.
>
> 3) He was denied effective assistance of counsel at both trial and appeal; specifically
>
> a) trial counsel failed to investigate and subpoena witnesses;
> b) trial counsel misinformed him of the maximum possible sentence he could receive if he pled guilty;
> c) trial counsel failed to object to the government's introduction of a tape recorded conversation between petitioner and the government's chief witness, Ignatius Stevens;
> d) trial counsel failed to conduct an inquiry into juror bias; and
> e) counsel failed to adequately consult with him in preparation for trial;
>
> 4) His sentence violates the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); and finally
>
> 5) He disagrees with the amount of restitution imposed.

Richards withdrew his *Apprendi* argument at the October 2002 evidentiary hearing,[5] but resurrected it in his Reply Brief and in

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[5] The transcript reads as follows:

MR. RICHARDS:	Excuse me. To the *Apprendi* issue, dealing with the four points enhancement, I would like to remove myself from that argument.
THE COURT:	You want to withdraw that one?
MR. RICHARDS:	Yes, sir.
THE COURT:	All right. So then we only have the four issues....

a July 22, 2004 motion to reinstate his *Apprendi* claim in light of *Blakely v. Washington,* 124 U.S. 2531 (2004).

The Government argues that issues one (insufficient evidence of robbery's effect on interstate commerce), two (failure to disclose exculpatory material), and five (the amount of restitution) are procedurally barred because Richards could have raised them on direct appeal, but failed to do so. (Resp. to Pet'r Mot. Pursuant to § 2255 7; Resp. to Pet'r Reply to the Gov't Opp'n to § 2255 Mot. at 2.) In his reply, Petitioner argues that issue one is jurisdictional and can be raised at any time. The Government now concedes that Richards' claim of insufficient evidence of an effect on interstate commerce is jurisdictional. (Resp. to Pet'r Reply to the Gov't Opp'n to § 2255 Mot. at 3.) The government further argues that Richards made "perfunctory reference to ineffective assistance of appellate counsel" with neither citation to the record nor explanation, and failed to satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 667 (1984). Lastly, the Government argues that Petitioner is procedurally barred from raising an issue based on *Appendi v. New Jersey*, 530 U.S. 466 (2000), because he failed to raise it before the Court on resentencing and on appeal. Alternatively, the Government contends that even if *Apprendi* and its progeny were

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(Tr. of Oct. 16, 2002 Motions Hearing at 6-7.)

applied,[6] Petitioner has no *Apprendi* issue insofar as his sentence was well within the statutory maximum. Petitioner counters that his conviction became final after *Apprendi* was decided, and facts not determined by a jury beyond a reasonable doubt were used to increase his penalty beyond the statutory maximum.

DISCUSSION

A. Legal Principles

The amendments to 28 U.S.C. § 2255, which were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"], Pub.L. 104-32, § 105, establish a one-year limitation period, running from the latest of four specified dates:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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[6] Any fact, other than a prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *See Appendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255, ¶ 6.

Section 2255 permits a court to afford relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. Section 2255 is intended to address "fundamental defects," such as jurisdictional or constitutional errors, that may have resulted in a "complete miscarriage of justice," or an outcome that is "inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (internal citations omitted). Even an error that may justify a reversal on direct appeal will not necessarily sustain a collateral attack. *See United States v. Addonizio,* 442 U.S. 178, 184-85, 99 S.Ct. 2235, 2239-40 (1979). A § 2255 motion simply is not a substitute for a direct appeal. *See United States v. Frady,* 456 U.S. 152, 165, 102 S.Ct. 1584, 1594 (1982).

B. Procedural Claims

The Government avers that issues two (2) and five (5) are procedurally barred from review in a motion under 28 U.S.C. § 2255

because of Richards' failure to raise them on direct appeal.[7] *See, e.g., U.S. v. Cepero*, 224 F.3d 256 (3d Cir. 2000), *cert denied*, 531 U.S. 1114 (2001) ("Section 2255 petitions are not substitutes for direct appeals and serve only to protect a defendant from a violation of the constitution or from a statutory defect so fundamental that a complete miscarriage of justice has occurred."). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' for the failure to comply with the procedural requirement and that actual 'prejudice' would result from the alleged constitutional violation, or that he is 'actually innocent.'" *Bousley* v. United States, 523 U.S. 614, 622 (1998) (internal citations omitted); *see also United*

[7] With regard to Petitioner's fifth issue--challenging the amount of restitution imposed--the Court notes that Petitioner's sentence was reduced by the trial judge after the instant § 2255 motion had been filed. On May 2, 2001, Richards filed a motion to modify his term of imprisonment pursuant to 18 U.S.C. § 3582(C)(2) which provides for modification of a sentence following an amendment to the relevant Sentencing Guideline. At resentencing, Richards also argued for a reduction in restitution, claiming that the district court erred in imposing restitution in the amount the court had ordered. Although the court did modify Richards' term of imprisonment at the resentencing based upon the intervening amendment to the Sentencing Guidelines, the court refused to change the order of restitution. Following modification of his sentence, Petitioner appealed this Court's imposition of restitution as part of his sentence. On appeal he argued: 1) that this Court erred by failing to hold an evidentiary hearing to calculate an accurate amount for restitution; and 2) that the Court erred by failing to consider his financial position in imposing restitution and requiring that he adhere to a schedule of payments as a special condition of supervised release. The Court of Appeals concluded that "[g]iven the limited nature of the proceedings under § 3582(C)(2)," it would "not consider Richards' attempt to use it as a vehicle to appeal his restitution order," and dismissed the appeal for lack of jurisdiction. *United States v. Richards*, 68 Fed. Appx. 340, 341 (3d Cir. 2003).

States v. Davies, 394 F.3d 182 (3d Cir. 2005). To establish "actual innocence", the Court of Appeals has held that:

> a habeas petitioner must "persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Actual innocence means "factual innocence, not mere legal insufficiency." The Supreme Court has required a petitioner "to support his allegations of constitutional error with *new reliable evidence*--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." "Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful."

Sweger v. Chesney, 294 F.3d 506, 522-23 (3d Cir. 2002) (internal citations omitted). Petitioner has neither established cause and prejudice, nor actual innocence, to overcome the procedural bar to issues two and five.

C. Sufficiency of evidence regarding the robbery's effect on interstate commerce.

With regard to issue one, Petitioner argues, and the government concedes, that insufficient evidence that his robbery had an effect on interstate commerce is a claim that is jurisdictional in nature, and can be raised at any time. Petitioner further argues in his reply brief filed on November 18, 2002, that the ineffective assistance of his counsel constitutes "cause" for his failure to challenge the insufficiency of the

evidence to establish that the robbery affected interstate commerce.

As the Court of Appeals noted, "some interference with or effect on interstate commerce, however minimal, is a jurisdictional element of a Hobbs Act offense, in the sense that a robbery . . . that has no contact with interstate commerce is beyond the subject matter competence of the district court." *United States v. Jannotti*, 673 F.2d 578, 624 (3d Cir. 1982) (citation omitted). The Government argues that:

> There was sufficient evidence that the robbery of K-Mart funds had an effect o[n] interstate commerce. K-Mart is an off-island company doing business in many states. Peter Mirambert, the co-manager of K-Mart testified that K-Mart purchased goods that it sold from outside the Virgin islands. Trial Transcript, Dec. 1, 1998, pgs 17-18. He also testified that the robbery reduced K-Mart's ability to buy goods until the money was refunded. Petitioner's discussion of the banking practices of businesses, misses the point that the robbery deprived K-Mart of the money from the sale of goods and thus, K-Mart was required to reduce its purchases of goods until the money was refunded. This had an effect on interstate commerce since K-Mart purchased much of its goods in interstate commerce.

(Resp. to Pet'r Reply to the Gov't Oppos. to his § 2255 Mot. at 4-5.) The undersigned agrees. Even a *de minimus* effect on interstate commerce is sufficient, and the Government set forth sufficient facts to prove that the robbery affected interstate commerce. *See United States v. Clausen*, 328 F.3d 708, 711 (3d Cir. 2003) (holding that conviction for Hobbs Act robbery is

constitutional so long as it has *de minimus* impact on interstate commerce).

D. Ineffective Assistance of Counsel

With regard to claims of ineffective assistance of counsel, it is well-established that:

> [A] successful showing of ineffective assistance of counsel may satisfy the "cause" prong of a procedural default inquiry. However, it can only do so if the ineffectiveness rises to the level of a constitutional deprivation under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish such a deprivation the defendant[] must first demonstrate that "counsel's representation fell below an objective standard of reasonableness." If that is established, defendant[] must then show that [he was] prejudiced by counsel's deficient performance. This requires that [he] demonstrate that "there is a reasonable probability that, but for counsel"s unprofessional errors, the result of the proceeding would have been different."

United States v. Mannino, 212 F.3d 835, 840, 844 (3d Cir. 2000) (internal citations omitted).

"In order to assess counsel's performance objectively, reviewing courts must resist the temptation of hindsight, instead determining whether, given the specific factual setting, and counsel's perspective at the time, his strategic choices were objectively unreasonable." *Marshall v. Hendricks*, 307 F.3d 36, 105-07 (3d Cir. 2002). While courts afford high deference to counsel's strategic decisions, *see, e.g., Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 (stating that "strategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"), "merely labeling a decision as 'strategic' will not remove it from an inquiry of reasonableness." *United States v. McCoy*, 410 F.3d 124, 135 (3d Cir. 2005) (citations omitted).

Petitioner was represented by Arturo Watlington, Esq. ("Watlington") at trial, and Richard Della Fera, Esq. ("Fera") and Alvin E. Entin, Esq. ("Entin") on direct appeal of his conviction. Petitioner specifically alleges that:

1) Trial counsel failed to investigate and subpoena witnesses.
2) Trial counsel misinformed him of the maximum possible sentence he could receive if he pled guilty.
3) Trial counsel failed to object to the Government's introduction of a tape recorded conversation between petitioner and the Government's chief witness, Ignatius Stevens.
4) Trial counsel failed to conduct an inquiry into juror bias.
5) Counsel failed to adequately consult with him in preparation for trial.

The Court is mindful that a petitioner generally may not relitigate issues that were decided adversely to him on direct appeal by means of a Section 2255 petition. *See United States v. DeRewal,* 10 F.3d 100, 105 n. 4 (3d Cir. 1993). An exceptions exists, however, when there has been an "intervening change in law" affecting the claim

previously decided adversely to the petitioner. See *Davis v. United States,* 417 U.S. 333 (1974).

1. Trial counsel's decision to investigate and subpoena witnesses.

Petitioner argues that he asked trial counsel, Watlington, to subpoena five witness, but he failed to do so. Specifically, Petitioner alleges that the following witnesses would have been able to rebut the testimony of Ignatius Stevens ("Stevens"), the Government's chief witness tying Petitioner to the robbery:

> First, Gabriel Toussaint ("Toussaint"), would have testified that Stevens was untruthful when he testified that every time he (Stevens) came around to talk to Petitioner about the robbery, Toussaint would walk away. Toussaint would have testified that he had never been around the Petitioner and seen him talking to Stevens. (Mem. of Law in Support of § 2255 Mot. at 17.))
>
> Second, Decilla Castor would have testified that she had never seen Stevens before, to contradict Stevens testimony that when he went to see Petitioner in Smith Bay, Decilla was with him, and Petitioner told her to excuse them so he and Stevens could talk. (*Id.* at 17-18.)
>
> Third, Peasir "Jimboy" Ray would have testified that he overheard that Stevens, Greenaway, and Bob Marley were in the mall speaking about the robbery. That testimony would, according to Petitioner, have linked someone else, "Bob Marley," to the crime. (*Id.* at 18.)
>
> Fourth, Rebecca Tumma, Petitioner's grandmother, would have testified that both she and Petitioner were at home on the day (and at the time) the Brinks armored truck was robbed. (*Id.*)

> Fifth, Illesr Williams Alexander would have testified that he came to Petitioner's home on the day of the robbery (at or around the time of the robbery) to tow a car for Petitioner. (*Id.*)

Petitioner relies on *Strickland*, 466 U.S. at 696, to argue that because the verdict rested on the testimony of the confessed accomplice, it was more likely to have been affected by the errors than a case with overwhelming record support. The Government argues that Petitioner has failed to demonstrate that not subpoenaing these witnesses was not a trial strategy.

At the October 16, 2002 evidentiary hearing, the following colloquy took place between counsel for the Government and Watlington:

> Q. Did Mr. Richards provide you information with respect to certain potential witnesses for his case?
>
> A. Yes.
>
> Q. Did they include Gabriel Touissant [sic]?
>
> A. Yes. Well, originally, Gabriel Touissant [sic] was also charged. We were going to use him as a witness, once in fact he was out of the case.
>
> Q. And did you discuss with him testifying?
>
> A. With Gabriel Touissant [sic]?
>
> Q. Yes.
>
> A. Yes.
>
> Q. And did he agree to testify for you?
>
> A. Yes.
>
> Q. Did you subpoena him?
>
> A. No.
>
> Q. Why didn't you subpoena him?

A. Well, he was here at the -- he was here for court. He came -- he came around a couple times when Mr. Richards was here, and I think he was here for jury selection. And I -- if an error was made, an error was made by me not subpoenaing him, because in fact he had indicated he would testify.

So, I may have made a technical or strategic error in not subpoenaing him to come as a witness. I thought he would, once he said he would be here, and him having been a friend of Don, that he would have been here for trial.

Unfortunately, he ab- -- he got lost, and I understand -- understood after the trial he was told not to appear by counsel who had represented him when he was charged in the case.

Q. Was Ms. Decilla Castor one of the –

A. I don't recall. I don't recall. I recall Gabriel Touissant [sic].

Q. Do you recall Peasir Ray, Jim-Boy?

A. I don't recall.

Q. And Rebecca Tomma [sic]?

A. I don't recall.

Q. Did Mr. Richards tell you he had an alibi?

A. Well, Attorney, you know if an alibi defense is going to be used, you have to file a notice.

Q. Yes.

Did he tell you that he had an alibi.

A. I think he gave -- there was no alibi in terms of a witness alibi, that I recall.

(Tr. Oct. 16, 2002 Hearing at 14-15.)

Watlington testified that he intended to call Gabriel Toussaint as a witness and simply assumed he would appear to testify absent a subpoena. This, the Court finds troubling. Neither *Strickland* nor the Constitution of the United States assures a petitioner an error-free trial, but there are myriad

safeguards provided to assure a fair trial, while taking into account the reality of the human fallibility of the participants. *See United States v. Hasting*, 461 U.S. 499, 508-09 (1983). Here, as it relates to Watlington's failure to subpoena Toussaint, the Court finds that Petitioner has satisfied the first prong of *Strickland* in establishing that Watlington's actions were unreasonable.[8] *Strickland*, 466 U.S. at 690.

Having so found, the Court must now determine whether Petitioner has shown that he was prejudiced by counsel's conduct in that there is a reasonable probability that Watlington's deficient assistance affected the outcome of the proceedings. In *United States v. Cronic,* 466 U.S. 648, 659 n. 25 (1984), the United States Supreme Court held that there are three situations in which prejudice will be presumed: where the defendant is completely denied counsel at a critical stage, when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or when the circumstances are such that there is an extremely small likelihood that even a competent attorney could provide effective assistance, such as when the opportunity for cross-examination has been eliminated.

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[8] The Court acknowledges that when it became evident to Watlington that Toussaint had reneged on his promise to testify, both Watlington and Petitioner's mother tried their best to locate Toussaint--to no avail, (Tr. Oct. 16, 2002 Hearing at 27), but this fact does not change the determination that Watlington's failure to subpoena this witness was unreasonable.

The Court notes that Petitioner testified at trial, and had the opportunity to rebut some of the statements made by the Government's witness, Stevens. Moreover, given the evidence presented at trial, the Court finds that the fairness of the trial was not seriously affected by Watlington's failure to subpoena Toussaint.

Lastly, in weighing the testimony, the Court is not convinced that Watlington, who candidly acknowledged his error in not subpoenaing Toussaint, was even aware of the other four witnesses mentioned in this § 2255 motion. Moreover, assuming arguendo that Watlington was aware of the other potential witnesses, the Court finds it an acceptable strategic decision to exclude those individuals who's proffered testimony would not, in all likelihood, have affected the outcome of the trial. The Court, therefore, finds no *Strickland* violation in failing to call the other four other witnesses to testify.

2) Trial counsel's advice to Richards regarding the maximum possible sentence Richards could receive if he pled guilty.

Petitioner argues that because Watlington misinformed him about the maximum possible sentence he could receive if he accepted the Government's plea offer, he was denied effective assistance of counsel. In making this argument, Petitioner relies on *U.S. v. Day*, 969 F.2d 39, 43 (3d Cir. 1992), which held that a petitioner

had stated a Sixth Amendment claim where he alleged that the advice he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer. Specifically, Petitioner alleges that the Government offered Watlington a plea bargain whereby in exchange for Petitioner's guilty plea on the conspiracy count (18 U.S.C. § 371), all remaining charges would be dropped. According to Petitioner, Watlington advised him not to plead guilty because it carried a maximum sentence of fifteen years. Petitioner later learned that the maximum sentence was five years on that count, and now argues that Watlington was ineffective in failing to assist him in weighing the pros and cons of taking the plea.

Not surprisingly, Watlington's recollection differs from Petitioner's. Watlington argued that from early ("maybe the first week") in his representation, (Tr. Oct. 16, 2002 Hearing at 30), he discussed maximum sentences with Petitioner; that it was his custom to present all plea offers to his clients; but that he did not routinely discuss details with respect to the Sentencing Guidelines unless his client indicated an interest in the plea offer. Again, the first prong of *Strickland* requires a showing that counsel's representation was deficient in that it fell below an objective standard of reasonableness. *But cf. Barker v. United States,* 7 F.3d 629, 633 (7th Cir.1993) (finding that "[m]isinformation from

a defendant's attorney, such as an incorrect estimate of the offense severity rating, standing alone, does not constitute ineffective assistance of counsel").

Last, but certainly not least, the Government contends that the Petitioner is mistaken in his belief that he was offered a plea to Count I only. Instead, the "plea offer provided that Petitioner would plead guilty to Count II--Interference with Commerce in violation of 18 U.S.C. § 1951 and Count III--Use and Carry of a Firearm in Relation to a Crime of Violence in violation of 18 U.S.C. § 924© not simply to Count I Conspiracy in violation of 18 U.S.C. § 371." (Resp. To Pet'r Mot Pursuant to § 2255 at 12.) The Court finds that Petitioner has failed to satisfy the first *Strickland* prong, so there is no need to look to the second prong on this issue.

3) Trial counsel's decision regarding objections to the Government's introduction of a tape recorded conversation between petitioner and the Government's chief witness, Ignatius Stevens.

Petitioner alleges that Watlington's failure to object to the Government's introduction of a tape recorded conversation between Petitioner and the Government's chief witness, Stevens, rendered Watlington ineffective. The Government argues that Petitioner has not provided a reason to exclude the evidence other than it was prejudicial, and he has not shown that trial counsel's performance

was deficient with respect to the admission of this evidence. Again, Petitioner must identify the acts or omissions of counsel that are not the result of reasonable professional judgment, and the Court must then determine whether "but for counsel's unprofessional errors, the result of the proceedings would have been different." *Mannino*, 212 F.3d at 840, 844.

At the hearing, when asked why he didn't object to the tape, Watlington stated:

> I think the tape spoke for itself. We know the conversation we had. It was our position that it was something -- he testified -- he testified that he knew you and . . . he made a call to you. That was about it.

(Tr. Oct. 16, 2002 Hearing at 32.) Petitioner argues that the tape was introduced only to show that he and Stevens knew each other, but instead its use exceeded the scope and was used to suggest (by way of things he did <u>not</u> say on the tape) that he was involved the crime. As a result, Petitioner says he was prejudiced by the scope of its use--particularly when it was used to cross-examine him. Petitioner alleges error in Watlington's failure to object to the expanded use of the tape, and failure to remedy the prejudicial impact of the tape on the jury.

The Court finds that Petitioner has not established that Watlington's representation was deficient under prevailing professional norms. Watlington understood that the tape would be

used for the purpose of showing that Petitioner knew Stevens, and it appears from his testimony that the Government used the tape in the manner in which he had understood it would be used. (*Id*.) Petitioner then tried to get an admission from Watlington that the tape had actually been used to create the impression that he not only knew Stevens, but that he had committed the crime. Watlington's response was that he that he did not recall.

The question here is not simply whether another attorney may have challenged the use of the tape, but whether Watlington's decision not to do so constitutes deficient representation, or a strategic decision. The Court finds that Watlington's representation on this issue fell within reasonable professional norms and could be considered a strategic decision. Petitioner has not met the first prong of Strickland.

4) Trial counsel's inquiry into juror bias.

At trial, a juror attempted to pass a note to the arresting officer, Warrington Tyson, asking whether he was related to the Tyson who taught at Eudora Kean High School. The note was intercepted, and the matter was discussed at side bar. The trial proceeded with the juror.

Petitioner argues that Watlington was ineffective in failing to attempt to have that juror removed from the panel because of the potential for prejudice. At the hearing, Watlington testified:

> We have a small community here . . . . Warrington Tyson was not a fact witness. He was the investigating officer. And I don't think that -- I didn't think that it mattered one way or the other.

(*Id.* at 35.) As Judge Moore inquired of Watlington, "You made a strategic or tactical decision that this would -- to go ahead with the jury and did not seek to remove." Watlington replied, "Correct." (*Id*.) The Court finds that Watlington's conduct on this issue does not run afoul of *Strickland*.

5) Counsel's consultation with Richards in preparation for trial.

Watlington testified that he met with Petitioner "either two or three times" before trial. He also discussed difficulties encountered in having to fly to Puerto Rico to meet with Petitioner at MDC Guaynabo in preparation for trial; and the delays encountered at the institution because the Virgin Islands Bar did not, at that time, issue identification cards to attorneys admitted to practice. Watlington admits that Petitioner, while located in Puerto Rico pretrial, was not as accessible as he should have been. The Court notes that at the time he represented Petitioner, Watlington had been in practice for at least twenty years. That said, in looking at this case as a whole, and Watlington's representation while lacking in some respects, did not offend the holding in *Strickland*. His representation generally fell within prevailing professional norms, and where his representation fell

below that which is acceptable, the Court found that Petitioner has not established prejudice that would have affected the outcome of the trial.

E *Apprendi* and *Blakely* Claims

Richards has raised *Apprendi* and *Blakely* issues. In assessing those issues, the Court first looks at whether Petitioner's judgment had already become final when *Apprendi* was decided. The relevant timeline in making that determination is as follows: 1) Petitioner's Judgment of Conviction was entered on February 7, 2000; 2) *Apprendi* was decided on June 26, 2000; 3) the Court of Appeals for the Third Circuit affirmed Petitioner's conviction and sentence on February 26, 2001; and 4) the United States Supreme Court denied *certiorari* on January 29, 2001. "By 'final,' we mean a case by which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Therefore, Petitioner's conviction became final on January 29, 2001--after the decision in *Apprendi*. It is also undisputed that Petitioner's conviction became final before the *Blakely* decision on June 24, 2004. Petitioner requests, in light of *Apprendi* and *Blakely*, that the Court resentence him within the statutory range of 33-41 months. (Amended § 2255 Mot. at 5-7.)

Without question, Petitioner would have been able to invoke an *Apprendi* claim on direct appeal, because his conviction had not yet become final at the time *Apprendi* was decided. *See Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *Griffith*, 479 U.S. at 328 (1987) ("[N]ew rule[s] for the conduct of criminal prosecutions [are] to be applied retroactively to all cases . . . pending on direct review . . ., with no exception for cases in which the new rule constitutes a 'clear break' with the past.")); *see also United States v. Vazquez*, 271 F.3d 93, 99 (3d Cir. 2001). Nonetheless, although *Apprendi* would have applied to Petitioner's case, he did not raise it on appeal or at resentencing, and that challenge was forfeited.

Failure to raise an issue on appeal constitutes a default, precluding collateral review, unless the defendant can show cause for the failure and prejudice resulting from the omission. *See Murray v. Carrier,* 477 U.S. 478, 491 (1986) (citations omitted) (adopting the cause and prejudice test for collateral review of procedural defaults on appeal). Petitioner has forfeited collateral review under a § 2255 petition of this claim, because he failed to demonstrate either cause for or prejudice from this default.

Relying directly on the holdings in *Apprendi* and *Blakely*, Petitioner also asserts a claim that he is "actually innocent" of

the enhancements that the sentencing court assessed against him, and the Government's witness never testified how much money was allegedly stolen or who played what role in the offense. (Reply to Gov't Resp. to Amended § 2255 Mot. at 11.) Petitioner's claim is one of legal innocence, not factual innocence, and the Court finds his actual innocence claim unavailing. *See, e.g., Leinenbach v. Williamson*, 152 Fed. Appx. 197, 199 (3d Cir. 2005) ("Leinenbach's argument is one of legal innocence, not factual innocence, based on the erroneous premise that *Apprendi, Blakely,* and *Booker* apply retroactively to cases on collateral review.")

Apprendi and *Blakely* are not retroactively applicable to this case on collateral review. *See Lloyd v. United States*, 407 F.3d 608, 613 n.3 (3d Cir. 2005) (reaffirming the principle that while *Apprendi* set forth a new rule of criminal procedure, that rule is not retroactively applicable to cases on collateral review where the judgments had already become final when *Apprendi* was decided); *United States v. Swinton*, 333 F.3d 481, 490 (3d Cir. 2003) (citing

Teague v. Lane, 489 U.S. 288 (1989));[9] *United States v. Jenkins*, 333 F.3d 151 (3d Cir. 2003).

Moreover, assuming arguendo that Petitioner's *Apprendi* claim was not procedurally barred, there is no *Apprendi* violation here because Petitioner's sentence did not exceed the statutory maximum. As the Government correctly states, Petitioner was convicted under 18 U.S.C. §§ 1951 and 2, and 371 which imposes a maximum penalty of 20 years imprisonment in all cases. (Gov't Resp. to Pet'r Amend. 2255 Mot. at 2.) Having considered the fact that the modified sentence Petitioner received was less than twenty years, that is, within the statutory maximum, *Apprendi* is not applicable here.

Lastly, on May 2, 2001, Petitioner filed a motion to modify his term of imprisonment pursuant to 18 U.S.C. § 3582(C)(2). Section 3582(C)(2) provides for a reduction in sentence for a defendant who was sentenced based on a sentencing range that was later lowered by the Sentencing Commission in an amendment to the

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[9] In *Teague*, the Supreme Court set forth general principles regarding retroactivity for new rules of criminal procedure, and explained that because of the interest in finality of judgments in the criminal justice system, a new rule of criminal procedure does not apply retroactively to cases that have become final before the new rule is announced. 489 U.S. at 309-10. *Teague* offers two narrow exceptions to these general principles. A new rule of criminal procedure will apply retroactively if it (1) places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or (2) requires the observance of those procedures that are implicit in the concept of ordered liberty. *Id.* at 311. The second exception is reserved for watershed rules of criminal procedure that not only improve the accuracy of trial, but also "alter our understanding of the bedrock procedural elements" essential to the fairness of a proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citations omitted).

Sentencing Guidelines, not based on a decision of the Supreme Court that is unrelated to an actual amendment of the Guidelines. *See United States v. Sanchez*, 140 Fed. Appx. 409, 410 (3d Cir. 2005).

As stated previously, Petitioner's § 3582(C)(2) motion was successful, and he was resentenced by Judge Moore on October 16, 2002. The Court of Appeals for the Third Circuit has held that a petitioner cannot use *Apprendi* to challenge his modified sentence under § 3582(C)(2). *See United States v. McBride*, 283 F.3d 612, 615 (3d Cir. 2002) (holding that *Apprendi*, does not afford relief under § 3582(C)(2) because such a claim is "independent of and unrelated to any change in the Guidelines, and [is], therefore, outside the scope of a sentence modification under § 3582(C)(2)"). Having duly considered the arguments, Petitioner's claims based on *Apprendi* and its progeny must fail.

CONCLUSION

For the reasons stated, Petitioner's motion under 28 U.S.C. § 2255 will be denied. An appropriate order follows.

E N T E R:

/s/

_____

CURTIS V. GÓMEZ
DISTRICT JUDGE

A T T E S T:
Wilfredo F. Morales
Clerk of the Court

/s/

_____

By: Deputy Clerk

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

DON RICHARDS,	)	D.C. CV. No. 2001/0212
Petitioner,	)	28 U.S.C. § 2255
v.	)	Ref.: D.C. CR. NO. 1998/0227
UNITED STATES OF AMERICA,	)	
Respondent.	)	

O R D E R

For the reasons stated in the Memorandum Opinion of even date, it is hereby

ORDERED that Petitioner's motion under 28 U.S.C. § 2255 is **DENIED;**

ORDERED that **NO CERTIFICATE OF APPEALABILITY** shall issue; and

ORDERED that pending motions, if any, are **DENIED as moot**; and

ORDERED that the Clerk of the Court shall **CLOSE** this file.

DONE AND SO ORDERED this 26 day of April 2006.

E N T E R:

/s/

CURTIS V. GÓMEZ
DISTRICT JUDGE

A T T E S T:

Wilfredo F. Morales

Clerk of the Court

/s/

_____

By: Deputy Clerk

Copies to:

Curtis V. Gómez, District Judge

Geoffrey W. Barnard, Magistrate Judge

Don Richards #00694-094, E-2, FCC Yazoo City (Medium), P.O. Box 5888, Yazoo City, MS 39194-5888 (Please Mark: "LEGAL MAIL: OPEN IN PRESENCE OF INMATE ONLY")

St. Clair Theodore, AUSA

Carl F. Morey, AUSA

Law Clerk-TLB

O. Schneider

C. Francis